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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. A. D. 1885.

No. 238.

THE VICKSBURG & MERIDIAN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

MARY E. O'BRIEN AND JOHN J. O'BRIEN, HER HUSBAND.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

ARGUMENT FOR DEFENDANTS IN ERROR.

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STATEMENT OF CASE.

This is a suit for damages brought by the defendants in error, Mrs. Mary O'Brien and her husband, in the Circuit Court of Warren county, Miss., against the plaintiffs in error, the Vicksburg and Meridian railroad, a corporation existing by virtue of the laws of Mississippi, for damages sustained by the defendant in error, Mrs. O'Brien, on the 16th day of September, 1881, while a passenger on said plaintiff's railroad, going from Jackson to Vicksburg. The case was removed from the State Court to the Circuit Court of the

United States for the Southern District of Mississippi, on the — day of March, 1882, where the case was tried before a jury, who returned a verdict for $9,000 for plaintiff, for which judgment was entered, and this writ of error was sued out by the plaintiff in error.

Notwithstanding the meagre report submitted to the Court by the record, compared to the case as presented to the jury, enough will appear thereby to satisfy the Court that the following facts existed when the accident occurred:

That the Vicksburg & Meridian railroad was, at the date of the accident, in the worst possible condition for safely transferring passengers over its line, and this, too, with the knowledge of those who had control of it, and whose duty it was to see to it that its passengers were protected from such accidents as grew out of its then condition, and to which Mrs. O'Brien's damages were solely due.

That the accident from which Mrs. O'Brien suffered was the derailment of the coach in which she was then a passenger, occurring from a broken rail resting upon a rotten cross tie. The rail had been in the service of the railroad over forty years, and the cross-tie for an indefinite length of time, which can only be judged of from its rotten condition.

That Mrs. O'Brien was seriously and permanently injured by this accident, as were others in the coach with her, being under treatment in Vicksburg, where she was removed from the scene of the disaster, of Dr. Quin, the physician of the railroad, some two months, and in his opinion, when she was removed to New Orleans, the place of her residence, her injuries were of such a character if not to last during her lifetime, would take years for her relief.

ARGUMENT IN REPLY.

The assignments of error, as formulated by the plaintiff in error, are as follows, and we will discuss them *seriatim:*

1. "The Court erred in overruling the motion in arrest of judgment, the said motion should have been sustained and judgment arrested."

The substance of this objection is that Mary O'Brien, the

party that was injured, is joined by her husband as party plaintiff in the declaration. There are difficulties in the way of this assignment of error that the Court will observe and admit. The Court will see by reference to Sec. 1511 Mississippi Code of 1880, that this is the law of this question:

"The non-joinder or mis-joinder of a Plaintiff shall not be objected to by the defendant at the trial, unless he give written notice thereof with his plea, stating the names of the person alleged to have been omitted, or improperly joined, and the Court or Judge, at any time before the trial of the issue, whether in law or in fact, may allow the declaration and writ to be amended by joining the party so omitted, or striking out the party so improperly joined, *provided* the party to be joined or struck out shall consent thereto, and the Court or Judge may impose such terms as may be thought proper."

This statute could have but one object, to prevent plaintiff in error from taking just such advantage of the party suing that is sought here. It requires that he shall not go to the jury, and take his chances of a verdict in his favor, and when it should turn out against him, to complain by a motion in arrest of judgment, that one of the parties to the suit was not a party, and ask to have it set aside on that account. It intended that he should deal fairly by the plaintiff in the suit, and if, in his opinion, the suit was improperly brought, by joining parties as plaintiff that should not have been so joined, that he should file, with his plea, a notice of his intention to complain of the improper joining of plaintiffs, and if he did not do so a motion in arrest of judgment would come too late. The Court will look in vain to the record for a notice from the defendant, in requirement of the law we have quoted, and the verdict will stand despite the plaintiff in error's motion in arrest of judgment.

But apart from this statute the motion for arrest of judgment is not well taken. The plea to the plaintiff's declaration of "not guilty of the trespass in the declaration mentioned, and of this it puts itself upon the country," it being in form "*ex delicto*," nothing is put in issue but the "*grav-*

amen" of the complaint, and as this Court say, "It is ordinarily true that the general issue in an action of trespass on the case imposes upon the plaintiff the necessity of proving all the material facts averred in the declaration; but the ability of the plaintiff to sue is not a fact directly averred, and, therefore, it can not be disposed of, under a plea of not guilty. *In fact it is not put in issue by such a plea;*" and then the Court goes on to discuss the subject upon its reason and principle.

Packet Co. vs. Clough, 20 Wal. 528.

Indianapolis and St. Louis R. R. vs. Horst, 3 Otto, 291.

But we contend, under our Statute of Amendments and Jœfails quoted by Counsel for plaintiffs in error, plainly by the statute, plaintiff in error is too late with his motion in arrest of judgment and we ask the reading of the statue by the Court as set out in the case.

It is to obviate the technical objection of defendant to a "general demurrer," after verdict—just what plaintiff in error desires to do by the 5th ground of the motion in arrest of judgment.

2. But it is objected by the plaintiff in error "The Court should not have allowed the statement by Dr. Quin, when he first saw Mrs. O'Brien, to be read to the jury. The witness could have been asked what was the physical condition of Mrs. O'Brien, at the time, and might have referred to the paper to refresh his recollection."

Dr. Quin was the physician of the railroad, under whose charge Mrs. O'Brien fell, by reason of the fact that he was the medical adviser of the corporation. He was called in to take charge of those who were wounded by the accident, and Mrs. O'Brien, finding him a skilled and scientific physician, retained him as her medical adviser, as long as she stayed in Vicksburg; and when her husband took her to New Orleans, he asked Dr. Quin to give him his opinion, in writing, of his wife's condition, at the time when she first came under his charge; and he gave him the statement in controversy here.

It is in writing, written by the Dr. and Counsel is wholly

mistaken in stating that the statement is not a part of Dr. Quin's sworn statement. It is as much his sworn statement as any other fact, to which he has testified in his deposition.

It is simply the *testimony* of the Doctor that his statement of the condition of Mrs. O'Brien was, at the date when it was given, and the facts were fresh in his memory. Counsel had the opportunity of cross-examining the Doctor on the truth of his statement, as rendered, it was made a part of the deposition for plaintiffs, and he did examine him upon it; for in his cross-examination, counsel for plaintiffs in error asked the Doctor this question:

X 4. "In the light of after experience, and after acquaintance with Mrs. O'Brien's case, in what respect, if any, would you alter or change written opinion of November, 1881, attached to this? What do you think of her case? Answer fully."

Answer to cross interrogatory 4—"I entertain no other opinion than that given to Mr. O'Brien in writing. I have not seen her for several months, and can only state, from hearing, that she is not improved much. My opinion of her case, up to the time I last saw her, was that her health might be permanently injured, and that there were some symptoms connected with her condition which would last for years." It is hardly reasonable to suppose that Dr. Quin was partial in his statement of Mrs. O'Brien's case; he was the medical adviser of the railroad, its agent in respect to his employment, and nothing but the truth and his own conscience operated with him in making his statement adverse to the interest of his principal. "And generally contemporaneous entries made by a third person, in their own books, in the ordinary course of his business, the matter being within the peculiar knowledge of the party making the entry, and there being no apparent and particular motive to pervert the facts, are received as original evidence; though the person who made the entry has no recollection of the facts at the time of testifying; provided, he swears that he should not have made it, if it were not true. The same principle has also been ap-

plied to receipts and other acts contemporaneous with the payment or the fact attested."

Greenleaf Evid. p. 139, Redfield's edition.

If Dr. Quin had lost all recollection of the condition of Mrs. O'Brien, at the time he testified, but could say that his statement of her condition, as furnished by him, was the truth, it could have been received on the trial, surely his deposition, with the original statement exhibited, and plaintiffs in error permitted to cross-examine him as to its correctness, and the Doctor testifying to its absolute truth, it is not strange that counsel can furnish no authority to support his opinion, that the Court should have ruled out Dr. Quin's deposition. But apart from this statement, Dr. Quin's answer to the 2d and 7th interrogatories of counsel for defendants in error gives a full and concise statement of Mrs. O'Brien's condition, at the time she was under his treatment; this testimony is given without reference to what he had written before, and is certainly not embraced under the objection here set out; and with the statement left out, the jury would have perfectly justified in finding the verdict for the defendants in error, and as this Court says in 20th Wallace, p. 528: "It would be idle to reverse a judgment for the admission or rejection of evidence that could have had no effect upon the verdict."

It is further objected, in this connection, that the Court did not exclude from the bill of exceptions the cross-interrogatories and their answers, propounded by the counsel for plaintiff in error. To use the language of counsel for plaintiff in error, "This practice does not tend to promote justice and should be discouraged," and doubtless the Circuit Judge so thought, when he ruled that it must be embraced in the bill of exceptions, against the objections of the plaintiffs in error. It is, to say the least of it, a most remarkable position for counsel for plaintiff in error to take; to have yielded to the objection would have been doing business by halves "with a vengeance." Counsel, however, does not press the point in his argument to the Court

4. It is objected "that the Court erred in allowing the

witness, Roach, to detail a conversation had by him after the accident, with Morgan Herbert, the engineer in charge of the train, at the time of the accident. The conversation occurred between ten and thirty minutes after the accident, and the idea was to prove, in this way, that the train was moving eighteen miles an hour. As developed by the defendant below the track where the accident occurred was a safe track for trains moving at the rate of fifteen miles an hour, and it was shown that "the train was moving at that rate of speed." It is somewhat difficult to distinguish the assignment of error from the agreement of counsel, they are somewhat mixed.

Morgan Herbert was the engineer in charge of the engine at the time of the accident; between ten and thirty minutes after the accident had occurred, he told Mr. Roach that the train was going at the rate of eighteen miles an hour, when the calamity took place. Herbert was in charge of the engine, and was the only man likely to know at what rate of speed the train was then traveling; he was the agent of the corporation with liberty to fix the rate of speed of the train, and within ten to thirty minutes after the accident the statement was made. By every principle that governs *res gesta* the Court properly admitted this evidence. The *gravamen* of the issue that the jury were called upon to try, was cause of the accident, and was it not competent for the jury to know, in illustration of the fact that was before them for trial, what was the speed that the train was going, at the time the casualty occurred? If so, who was the best authority on that point, if not the engineer of the train, whose duty it was to know what speed the train was making? Within ten to thirty minutes after the accident, just as soon from the nature of the case it could be done, he was applied to by the witness Roach to know what was the speed of the train, and he replied "eighteen miles an hour." The statement does not fall within that class of declarations which "are mere narrative of a past transaction," as counsel would argue to Court.

1 Greenleaf Evid. p. 126.

It has a *present and contemporaneous* existence with the fact in controversy, between the parties, and it is called for in illustration of the circumstances of the accident that form the basis of the action that the jury were to investigate. The short space of time between the accident and the declaration, and the circumstances of what was declared, took the case from out the ruling of the Court in the case of the Packet Co. vs. Clough 24 Wall. 528. In this controversy days had been allowed to elapse after the accident complained of, and the declaration of the Captain of the Packet Co., and the declaration was merely what sub-employees of the Packet Co. failed to do for the protection of Mrs. Clough. The Court says "A Captain of a passenger steamer is empowered to receive passengers on board, but it is not necessary to this power that he should be authorized to admit that *either his principal, or any servant of his principal has been guilty of negligence in receiving passengers.* There is no necessary connection between the admission and the act."

If this statement of Herbert, the engineer, was at all important in the case, it was clearly *res gestæ*, because it was given at the time required by the rules of evidence, and it pertained to what was peculiarly within his knowledge, and not within the knowledge of any other agent of the corporation. This Court cites, with approval, the rule furnished by Mr. Justice Story in these words, "Where the acts of the agent will bind the principal, then his representations, declaration and admission, respecting the subject matter, will also bind him, if made at the same time, and constituting a part of the *res gestæ*.

Story on Agency § 434.

And we submit that the rule, as here laid down, admit the statement made by the engineer Herbert.

1 Greenleaf Evid. § 108.

"The declaration of a person who is wounded and bleeding, that the defendant has stabbed her, made immediately after the occurrence, though with such an interval of time as to allow her to go up stairs from her room to another room, is admissible evidence after her death, as a part of the *res gestæ*.

Commonwealth vs. McPike, 3 Cush. 181.

"Declarations to become a part of the *res gestæ* must have been made at the time the act was done, which they are supposed to characterize, and have been well calculated to unfold the nature and quality of facts they were intended to explain, and so to harmonize with them as obviously to constitute one transaction."

Enos vs. Tuttle, 3, Conn. 250.

In the case of Meek vs. Berry, reported in 7 George, 190 Mississippi, and cited by counsel for plaintiff in error, and in which this whole subject of *res gestæ* underwent a very exhaustive examination, the Court had this to say upon the subject: "The inherent difficulty of the subject, and the necessity of referring the discussion of each case to its own particular circumstances, without the aid of "any precise general rules" to guide us in our judgment, would seem to commend in these cases a very cautious exercise of the reversing power, for tribunals whose advantages are greatly superior to ours, in the ascertainment and minutest comprehension of these particular circumstances, which are regarded as giving illimitable variety and difficulty on the subject, to the rules of the decision which should guide them, it would seem safer to defer much to their discretion."

In the course of the trial below there was "other proof showing that the schedule time between Jackson and Vicksburg was two hours and thirty minutes, and the distance between the two points 45 miles," page 12 of the Record, and that "the rate of speed did not exceed fifteen miles an hour, and that the train, at the time of the accident, was running at that rate of speed." Record p. 20.

This proof evidently was given by witness of the defendant on the trial below, and the force and weight of the testimony pro. and con. was properly to be weighed by the jury, under the rulings of the Court. Can this Court say, with what is before them of the case by the Record, that the statement of the engineer, Herbert, weighed one particle with the jury in the verdict that they rendered? The case of Kramer vs. State, 61 Miss., cited by the counsel for the plaintiff

in error, is not in point. That was a criminal case, in which a man was being tried for homicide, and the evidence, proposed to be introduced against the prisoner, was excluded for the reason "that a sufficient time had elapsed for the fabrication of them by the deceased."

It is submitted, a much more stringent rule will be observed in criminal trials, as to this subject of *res gesta* than in civil cases, for reasons which it will be superfluous to recite to this Court. In the case last cited, the Court says, admitting the necessity of the rule adverted to, even in criminal cases, "There are, and, in the nature of things, must be, many cases in which proposed testimony lies so near the line that it is difficult to determine upon its competency, but such is not the case here."

If the testimony had any weight with the jury, it was competent for them to consider it in any view of the case.

6. It is further objected that "the Court erred in allowing the reading of Raworth's report to the stockholders of the company as evidence. It was not competent. The writer of the report was in the court room as a witness, and should have been examined had the plaintiff desired to establish the facts set out in the report. The report was doubtless based not upon personal knowledge but upon information derived from inferior servants of the company." To determine the question whether the testimony was properly admitted, we have first to inquire who was Mr. Raworth, and the place in the corporation that he filled; and second, what was his testimony. Mr. Raworth held the position of "Superintendent" of the Vicksburg and Meridian railroad. At the risk of being tedious, we will briefly state what the duty and employment of a "Superintendent" of a railway should be. He should keep himself informed of the *material* of the road, and especially to be informed as to the condition of the track, for it is to him the corporation looks, and to him only, in case it needs repair. It is his duty to report to the stockholders of the corporation, from time to time, the performance of this duty, and to state whether or not the condition of the road is such that those who travel

upon it can do so with safety to life and limb. He is the agent of the corporation, whose duty it is to make this report, because he alone knows what he reports. It is within the scope of his employment, and when made and delivered binds his principal as part of the *res gesta*. This duty of reporting to the stockholders Mr. Raworth performed on the 1st of March, 1880, and it is reasonable to suppose that this was the last report that he made, up to the time of the accident.

The nature of the testimony set out in the report can be seen by the report itself, Record pp. 12, 13 and 14, and we think we did not overstate the purport of it, when, in the beginning, we asserted that it showed that the Vicksburg & Meridian railroad was in the *worst possible condition* to insure the safety of those whose business made it necessary for them to travel upon it, and that the stockholders of the road were fully advised, a year before the accident, by the only authority that they looked to and held responsible for the condition of the track, in what situation is was. The burden of the condition of the track was lifted, by the report, from Raworth the Superintendent's shoulders, and placed upon those of the stockholders, the responsible parties in this suit. As to what appears thereby, Mr. Raworth declared that the improvements of the railway track were but a "makshift" in the way of repair and betterments of the road. The road was only 145 miles long from Vicksburg to Meridian, and Raworth in his report says: "You (the stockholders) have 81½ miles of fifty-pound rail *much laminated*," which means, in other words, *worn out*. This rail, he goes on to say, "has been in constant service for twenty-one years, and the only renewal is over *one mile*, or about eighty-four tons." He says: "There are twenty-five miles of your track made of iron laid down upon the road originally, and *forty-two years in service*. Its original weight was forty-five pounds to the yard: *now it is almost entirely worn out, and when taken up is only fit for the rolling mill*. This old rail should be renewed *at once*, and the track put in condition to make reasonable speed." The report goes on to say: "Economy has been the principle that has guided the management in every depart-

ment, and so rigidly has this principle been enforced that we find ourselves in the condition that means must be employed and money spent *to enable the road to be operated at all.*" This report was made at a time when there could be no doubt of its honesty. It came from the agent ot the corporation whose duty it was to make it, the matter reported being peculiarly within his knowledge. When laid before the stockholders, it became as much their act, and bound them as fully under the law, as if it was the combined admission of each of the stockholders. When we take into consideration what the record declares was the fact, (Record p. 14) that the *broken rail and rotten cross-tie*, which caused the accident, was at the point where the rail was "forty-two years in the service, whose original weight was forty-five pounds to the yard, now it is almost entirely worn out, and when taken up is fit only for the rolling mill, * * * and that no recommendations of the report had been carried out on this part of the road by the company before the accident occurred," establishes the liability of the road conclusively, to any impartial mind.

Greenleaf Ev. §113–114.

Counsel argues that this proof was met by defendant, by showing that the broken rail had been, "with others, on some portions of the track, taken up and welded some years prior to the accident; that the defendant was engaged in laying new rails on this portion of the track, and had approached near to the point at which the accident occurred—"within one mile and a half of it."

Plaintiffs brief, p. 20.

It is enough to say, in answer to this logic, that this does not account for the *rotten cross-tie*, and that it would have been better for the railroad, and far better for Mrs. O'Brien, if the rail had been substituted by a new one, and a new cross-tie supplied. And it is hard to understand how Mrs. O'Brien was benefited by the laying of new rails, *a mile and one half from where the accident happened*, or how this fact in any way tends to relieve this corporation of the consequences of the broken rail and rotten cross-tie where the accident did occur.

Counsel for plaintiff in error argue that "the Superintendent could and should have been introduced to prove the facts as stated in his report." Raworth was on the stand, (see record 19,) and it strikes us that it was the duty of the defendant, who introduced him, to prove that the report, which had been read and admitted by the witness, was not true. But the proof *was* made, by the defendants in error. The direct question was asked him, "if the report was not made by him, and if it fairly represented certain portions of defendant's road at the time," he made answer in the affirmative.

The statement of counsel for plaintiff in error, that "Mr. Raworth was not dead, and is not shown to have had any *personal knowledge* of the facts embraced in the report. Doubtless it was based npon the statement of the engineer, or other officer, charged with the reparation of the track, and at best hearsay—second-hand evidence—which is never allowed where direct evidence is at hand."

Brief p. 21–22.

It is enough to say, in answer to this, that Mr. Raworth was on the stand as defendant's witness, and if the report, signed and testified by him as correct in every particular, "was only hearsay or secondary evidence," it was within the power of the plaintiff in error to have shown that fact. It did not do it, and it rests only on declaration of Counsel, that the testimony was of the character of hearsay. Certainly the witness said otherwise.

7. It is objected that "the Court erred in not allowing the reports of the President and Secretary of the company to be read after allowing that of the Superintendent to go before the jury. The whole pamphlet should have been read or none. The reports of the other officers were explanatory, and tended to show that the railroad company was doing all that it could to repair its track."

It no where appears by the record that Raworth's report was embraced in the *same pamphlet* with the reports of Rigby, the President, and Vosburg, the Secretary, as counsel for plaintiff in error would put it. The only reference that is made in the record is found at p. 15, where it says "the report

of said Raworth was connected with the report of Thomas Rigby, President of defendant company, and W. Vosburg, Secretary and Treasurer thereof, all of which reports were made to the stockholders of said company at the annual meeting in March, 1880." It does not appear thereby that the same pamphlet embraced all the reports. This question is of no particular value in discussing the merits of the case, and is only referred to, to state the record accurately.

It is not difficult to see what counsel for plaintiff in error hoped for, in getting the excluded testimony before the jury. It would have afforded him an opportunity of arguing to them that the stockholders were doing all in their power with the means they had in hand, to put the road in a condition of decent repair, *and had advanced needed repair within a mile and a half* of the scene of the wreck, where Mrs. O'Brien was disabled. How this argument could help the railroad, in the emergency that this accident placed it, under the law, is beyond our comprehension. It only shows to what straits the plaintiff in error is reduced in this case. It is certain that the railroad had been built forty-two years, for this very rail that broke had been doing service that length of time; the rotten cross-tie the record leaves in doubt as to when it was placed there. The report of the Secretary and Treasurer shows for the preceding year the net revenue of the road was over $80,000, but it had all to be consumed *in old debts*, according to the report of Mr. Rigby, the President, *and this at the risk of the life and safety of its passengers.* It this $80,000 had been used in repair of the road, this mile and a half that was left incomplete would have been repaired, and the accident to which this suit relates would have been avoided. This Court will determine whether the court erred in excluding from the consideration of the jury these reports, irrespective of the fact whether the report of Raworth was proper testimony or not. They had no connection, one with another, and because the report of Raworth was admitted or rejected, can cut no figure in the determination of the question as to the admissibility of the reports in question. We respectfully submit that it was clearly incompetent to admit them to the jury, as the pecun-

iary condition of the road could, in no possible event, have weighed one particle in the determination of the case.

8. It is objected that "the Court erred in allowing the plaintiff below to prove by Raworth, that he made a similar report to the company in 1874." This assignment of error grows out of the following question, asked Raworth—"Witness was further asked if he had not made a similar representation to the management in 1874," but this question was objected to by counsel for defendant below, and the Court having overruled the objection, defendant excepted. (Record p. 19.) But it nowhere appears in the record what the answer of the witness was; it may be he answered yes, or it may be he answered no—the record does not show. This court can form no idea from the record what the witness stated in reply. This assignment, therefore, is without avail when we consider the 7th section of the 21st rule of this Court, which is as follows: "When the error is alleged as to admission or rejection of evidence, the specification shall quote the full substance of the evidence offered, or copy the offer as stated in the bill of exceptions. Any alleged error not in accordance with these rules will be disregarded."

If the answer was "no," it was in favor of the defendant below, and it could take no advantage of the error.

Bethel vs. Mathews, 13 Wall. p. 1.

45 Miss. Reports, p. 66.

9. It is finally urged by counsel that "the Court erred in refusing to give the special charge asked by the plaintiff in error, and found on page 21 of the printed record. The whole case should have been made to turn upon that charge, and if the jury believed the facts stated, they ought to have found for the defendant. The refusal to give this charge almost necessitated a verdict for the plaintiff below."

Admitting [redacted], for the sake of argument, that error occurred in the charge complained of, we think plaintiff in error is estopped by the record, as it appears there, and waived his right to complain of this charge given by the Court. On page 21 of the printed record, we find just what occurred at the time the charge was given, and which immediately fol-

lowed the charge that counsel for plaintiff in error asked of the Court.

"This request was made of the Court before its presentation of its charge to the jury and refused, but was considered by the Court in preparing its charge. The Court declined to give the charge employed by counsel, but prepared a charge in writing which was read to the jury, in the hearing of counsel for both parties, and when the same had been read, *counsel for defendant* announced to the Court that he was satisfied with the charge of the Court as given, and made no further request or objection in reference thereto." The charge given by the Court was as follows: (Here follows the charge as delivered by the Court.) What was done is very manifest from the recital in the record, and is as of much authenticity as the judgment that is sought to be reversed. Counsel for defendant below not only *acquiesced* in the charge as delivered by the Court, but expressed himself satisfied with it and made no other request or objection in reference therete.

Now, with this "waiver" or "admission" of record, in the case, will the Court allow any complaint of the charge? We think not. If there was anything in the charge that is objectionable, counsel should have made it known to the Court at the time it was proposed to be given, and afforded the opportunity of modifying it, but he did not do this, he expressed himself as perfectly satisfied with the charge proposed to be given, and without objection *submitted* and *acquiesced* in the giving of it. As far as the Court is concerned it was a waiver. It was important too, to the defendants in error, that he should have given this opportunity to the Court. They were most vitally interested in the charge, ~~and were surprised and thrown off their guard by this acquiescing the charge~~, and supposed, as they had every right to suppose, that defendant's counsel below was satisfied with it, as he had expressed himself to that effect. If counsel for the defendant below, had not thus expressed himself, or had even remained silent. Counsel for plaintiffs below would have taken the charge, unless modified, with any consequences that it entailed. That would have been fair, but as the case

now stands, can it be thus characterized? Counsel complains "that this statement was forced in the bill of exceptions as this Court can and will understand, in order to fix a waiver of the exception, and estop us from here insisting upon it." Brief p. 8. This is a grave charge to bring upon the Court below, that it *forced* in the bill of exceptions, anything that did not properly appear there. We take issue with counsel as to this, and stand by the record, as plaintiff in error has presented it. At page 27, 28, of the Brief, counsel moderates his tone somewhat. He says: "Nor is it shown from anything in the record, that the exception taken were waived by counsel for plaintiff in error. The idea that assent expressed, when an attorney could not help himself, and desired to be respectful, should be of greater efficacy than assent growing out of *silence*, and amount to release of error, distinctly relied upon at the time, seems to us to be fanciful to say the least of it."

We assert that counsel for plaintiff in error, can not now be heard to complain, under this assignment of error, that he did not do what justice to the Court, and defendant in error required him to do. He not only did not remain silent, but upon the contrary, expresses himself satisfied with that of which he now complains. It was "an agreement" with Court and plaintiff in the Court below, shown by record, that he would do no such thing:

Muolor vs. American Life Ins. Co., 111 Otto 335
Swaim vs. Seamens, 9 Wall. 254.
Walker vs. King, 1 How. Miss. 17.
Gregg vs. Von Phul. 1 Wall 274.

In this last case the Court say "The primary grounds of the doctrine is that it would be a fraud in a party to assert what his previous conduct had denied, when in the faith of the denial others have acted."

The Supreme Court of this State say upon, this question of estoppel: "There is a wide difference between encouragement and silence. It is only when silence becomes a fraud that it operates as an estoppel."

Stanton vs. Bryant, 55 Miss. Rep. p. 261.

It is difficult to see wherein lies the principle of what

would operate as an estoppel of an admission of fact, and that of law. In either case it is the harshness of what would otherwise be the rule, that is sought to be obviated. In Holly vs. Young, 68 Maine Rep. 216, reported also in 28 American Rep. p. 40, the Court say: "That an admission made, at the first trial if reduced to writing or incorporated in the record of the case, will be binding at another trial of the case, unless the presiding Justice, in the exercise of his discretion think proper to relieve the party."

It is proper to call the attention of the Court to what appears on page 23 of the Record, "*at the time* at which the Court referred to give the above specified charge, as requested by counsel, the latter excepted, and the latter now tenders his third bill of exceptions which he prays, &c." We will leave the Court to decide, whether this statement of the fact under discussion, should be of greater weight, that what appears on page 23 of the Record, giving particularly, and more in detail, what transpired at the giving of the charge to the jury by the Court, for it is certain that they are wholly inconsistant, and one or the other cannot be true.

The charge asked by counsel for the plaintiff in error, which will be found on page 21 of the Record, simply gave the jury the option of discrediting wholly the witness Smith, or believing him, and finding for the defendant below, and this too with all that the record shows were the facts, and such facts as was presented to the jury, that the record fails to disclose.

Counsel say—page 23 of his brief: "Certainly the facts being *conceded* the plaintiff had no case, and defendants are entitled to judgment" we are very far from *conceding* what counsel states the facts to be, and prefer to be governed by the statement in the record.

Let us analyze the charge that the Court refused to give! Smith was *the only witness* who proved that the charge sets out. This is evident from the nature of the testimony. He was the only one who passed over the road "about the close of the day," and saw what he supposed was the condition of the track. The charge declares. "*If the jury believe from*

the evidence that R. H. Smith, the section master of defendant, having charge of that section of defendants track on which the accident occurred, was a competent, educated, prudent, careful and skillful section master," with no one to speak of his competency but himself, it is not surprising that he possessed the qualities that he is here loaded with. "*That in the discharge of his duty as such section master, he passed over and examined, and inspected that part of his section where the accident occurred, and to all appearances said section was in a safe roadworthy condition, for the passage of the passenger train the following morning, which moves at the rate of fifteen miles an hour.*"

It was manifest to the Court that refused the instruction, that the road was not in a "safe" condition, for the accident developed the fact, that there was a *rotten cross-tie*, and a broken rail, and the Court properly refused to take from the jury, the facts that the record shows, and substitute other statements, to give counsel who asked the charge, the option saying to them, that they were concluded by the instruction of the Court, and must find accordingly. "*That the defect in the rail, afterwards broken, was a latent defect undiscernable by external observation, and which could only be discerned by taking up the rail and breaking it.*" This is the grist of this charge, and we detect errors in it, that fully vindicates the Court in refusing to give it as asked. In the first place it lays the whole blame of the accident to a broken rail, and says nothing of the *rotten cross-tie.* It charges further, that this defect in the *rail* was a *latent defect*, and assumes that it was "undiscernable by external observation, which could only be discovered by taking the rail up and *breaking it.*

~~The admitted proof was, that the rail was broken at the time of accident~~. The record cites, on page 20: "That there was also proof to show the very reverse." It will be seen also, that the proof in the cause was. "That Smith passed over his section of defendant's track, including the point at which the accident occurred, and *discerned* nothing to attract his attention or remotely suggest that was or could be any danger at the point to the passenger train, that was to pass over his section in the morning about daylight." Record p.

20. This is merely *negative* testimony, and the repudiated charge states it as *a fact*, that stands out prominent in the case.

"*That on the morning of the accident the locomotive, tender, baggage and smoking car attached to train, passed over the rail safely, and that the rail gave way under the ladies' coach of the train, because of the latent defect in it, not discernible by external observation, and only discernible by taking it up and breaking it; the train was running at the rate of fifteen miles an hour, they will find for the defendant.*" The counsel rings the "latent defect" of the rail in all its changes, and seems determined to get this in as an established and only fact before the jury—and seemingly to avoid what the record admits as true, that the *rotten cross-tie* cut as much figure in the disaster as the rail which was broken, and was probably the main cause, for if it had been sound, the remainder of the train might have passed over in safety, but being *rotten*, it was bound to give way at some time, and did so when the ladies' coach was upon it. This cross-tie was the only support of the rail in its "laminated" condition, being "only fit for the rolling mill," it gave way and brought on the disaster. All this because Mr. Smith "*discerned nothing to attract his attention or remotely suggest that there was or could be any danger at that point to the passenger train*," notwithstanding Raworth, with all the earnestness that he could control, impressed it upon the stockholders more than a year before, that the track was unfit for passenger travel. Counsel say (p. 24 of his brief), "We concede that when the rails have been in use as long as they could with safety be used, it would be the duty of the company to take them off the road until repaired and made sufficient and safe. But that duty had been discharged in this case *to the extent of the company's ability.*" The counsel admits away his whole case, by this admission. What the law requires of railroads is to keep their track in a safe condition, for those who are compelled to use them—*this they must do*, and admits no such rule in violation of the requirement as Counsel would make. To say that the company's idea of its "ability" should be the criterion to govern in the case is, to say the

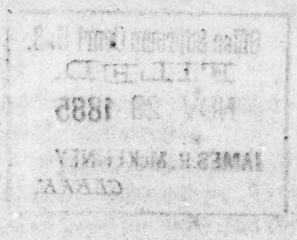
least of it, somewhat "fanciful," as counsel would say. Adopt this as the rule in this class of cases, and it would puzzle the wisest of us to know, in what case the corporations of this character could be held liable in any action for damages. The action of the Court below was proper in refusing this instruction.

Indianapolis & St. Louis R. R. vs. Horst, 3 Otto, 291.

The Court in its charge to the jury said: "Under the statute of the State regulating railways, provides that when the injury is proved, it is *prima facie* evidence that it was the fault of the defendant and its employes, and throws upon the defendant railroad company, the burthen of proving that the accident did not arise from any neglect or want of skill or other wrong upon the part of the defendant and its employes. You will observe this rule of evidence in considering the testimony in the cause."

The Court will observe that the charge as given by the Court below, was not excepted to, nor is it assigned for error. The 9th and final assignment of error, of plaintiffs in error, is limited expressly to the failure of the Court to give the refused charge. No exception or assignment of error is made to the Court's charge, but counsel for plaintiff in error, in his *argument*, insists that the Court should not have given in charge to the jury, what we have quoted above—p. 26 brief. In fact, the charge of the Court below, should not have been embraced in the bill of exceptions, and rule 4 of this Court was clearly violated when it was so embraced. "Each error shall be separately alleged and particularly specified. Otherwise it will be disregarded." And again, "When the error alleged is to the charge of the Court, the part of the charge referred to shall be quoted *totidem verbis* in the specification." Secs. 5 and 6 of rule 21 of this Court. These rules are violated in the effort of counsel to discuss the charge of the Court below. No exception has been taken to it, and he has no right to discuss it.

Apart from this objection, the record is quite full of proof that the corporation was guilty of neglect, in not having its track in a condition of safety for those who travelled upon it,



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1885

No. 238.

THE VICKSBURG & MERIDIAN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

MARY E. O'BRIEN AND JOHN J. O'BRIEN, HER HUSBAND.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

In addition to what we said in our first brief, we wish to call the Court's attention to the case of Insurance Co. vs. Mosely, 8th Wallace 397, which escaped our attention when we filed it for defendant in error. This case appears to us to be entirely conclusive of the propriety of admitting the testimony of Morgan Herbert, the engineer of plaintiff in error, to the jury in the trial below.

Among the cases cited sustaining the doctrine of *res gestæ* as there laid down, and which we contend is applicable to case at bar, is the case of the Hanover Railroad Co.

vs. Coyle 55, Penn. State p. 402, which, as we read it, is one exactly in point. That was a case, *in tort*, for damages against the railroad, where a peddler's wagon was struck, and the peddler was injured by a locomotive.

This Court cites with approval, what the Supreme Court of Pennsylvania say, which is as follows : "We cannot say that the declaration of the engineer was no part of the *res gestæ*. It was made at the time, in view of the goods strewn along the road by the breaking of the boxes, and seems to have grown directly out of, and *immediately after the happening of the fact*."

This declaration (say this Court) was held to be *a part of the transaction itself*. The declaration of Morgan Herbert, the engineer of the plaintiff in error, was made from ten or thirty minutes after the accident occurred. It would certainly seem, so far as the time at which it was made, *a part of the transaction*. Counsel for plaintiffs in error, find objection to this testimony as being a *subsequent* statement made by way of relation of the occurrence, p. 19 of this brief. It could not have been made before the accident occurred, and it certainly was made as briefly after it occurred, as in the nature of things it could be. He contends the proof in the case tends to show that the track was *safe* for trains running at the rate of fifteen miles an hour, p. 18 of his brief. As a consequence the testimony of the engineer, Herbert, that the train was being run at the time of the accident *eighteen miles* an hour, was properly admitted to the jury, especially in view of the decision of this Court in the case of Insurance Co. vs. Mosely. But apart from this testimony, we think there is proof in the record, to show the Vicksburg & Meridian Railroad was not in condition, at the time the accident occurred, to run as much as ten miles an hour, there can be no doubt of this, and we think the Court will so find, upon the examination of the record. In Beaver vs. Taylor, 1 Wallace p. 637, the doctrine of *res gestæ* is discussed, and this Court take very much the same view of that question as does the Supreme Court of Mississippi in the

case of Meek vs. Berry 7 George, 190, whose opinion is found in our first brief p. 9.

The case of Kraner vs. State, cited by counsel, p. 19 of the his brief, is based upon Field vs. State, 57 Mississippi Reports, p. 474, in which Courts opinion in Insurance Co. vs. Mosely, 8 Wallace 397 is criticised. It is not very clearly seen, why the dissenting opinion of Justice Clifford should here find so much favor in the opinion of the Supreme Court of Mississippi, unless it was for the purpose of sustaining an opinion, that, to every reasonable mind, should have been just the reverse of what it was. In that case, the Mississippi Court admit the dying declaration of the woman, as to how she felt after she was poisoned, but reject her statement of *what she had eaten an hour before*, that tallied with other testimony fixing, upon the prisoner proof of the poisoning in the case, and make its admission by the Court below to the jury, a ground for reversal. It seems to us, as an instance where the judgment of the Court was outweighed by its sympathy, and in a case, too, where sympathy was in strong contrast with justice.

THOS. C. CATCHINGS,
Att'y for Defendants in Error.

THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 238.

THE VICKSBURG & MERIDIAN RAILROAD CO.,
Plaintiff in Error.

vs.

MARY E. O'BRIEN AND JNO. J. O'BRIEN,
Defendants in Error.

In error to the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF FOR DEFENDANTS IN ERROR IN REPLY.

Argument for Defendants in Error in Reply.

It will be more convenient to discuss the errors assigned in the order in which they are stated.

I.

The motion in arrest of judgement was properly overruled.

No claim in behalf of the husband was propounded in the declaration for money expended in the effort to cure the wife of her injuries, or for support and maintenance while disabled, or for loss of her services or society.

This is not a case where the wife presents a claim for personal injury, and the husband, in the same action, seeks to recover for damages personal to himself.

It may be conceded that such claims should be propounded in separate actions.

In Mississippi a married woman has the same right and capacity to hold and dispose of property, and to bind herself personally, and with reference to it, and to sue and be sued, as if she were not married.

Code 1880, § 1168.

So far as we may judge, therefore, from the record, Mrs. O'Brien, in pursuance of her legal right, was suing to recover damages sustained by her by the personal injury. A part of the loss attending that personal injury was the money expended by her in the effort to be cured.

The expenses alleged by the declaration to have been incurred for this purpose are not, in terms, stated to have been incurred by the husband; and, inasmuch as she had the right under the law to contract for and defray them herself, and as we are bound to presume that if they had been defrayed by the husband they would not have been improperly joined in the same suit, with the wife's claim based upon the personal injury received by her, we are forced to construe the declaration as a statement of the wife's claim only.

That she was the sole plaintiff, and that only her demands were submitted for trial, clearly appears from the charge of the Court.

After defining the law governing the question of liability by the railroad, it is as follows:

> "If you find for the *plaintiff*, your next inquiry will be to ascertain from the proof as to what sum will be a just, fair, and reasonable compensation to the

plaintiff for the injury *she* sustained by reason of the accident.

"In doing so, you will take into consideration the expense incurred by reason of the injuries received, including medical bill, hire of nurse, and other expenses already incurred, or which must in all probability accrue in the future, arising from the injuries received; and also the loss of time by which *plaintiff* was deprived from attention to her domestic duties, and deprivation of the power of moving from place to place, as her business or pleasure might require; also the physical and mental suffering the *plaintiff* has already endured, or will endure, in all human probability, suffer in the future, growing out of the injuries received."

Nothing is said about expenses incurred by the husband, or loss to him of his wife's society or services.

The charge concludes as follows:

"But if you shall find that the accident was caused by the negligence or wrongful conduct of the defendant and its employees, then your verdict will be for the *plaintiff*, for such reasonable damages as you may deem *her* entitled to for the injuries received under the rule stated."

The jury were not instructed at all as to the rules by which they were to determine the claim of the *husband*, for the manifest reason that *he* had propounded no claim whatever.

Dr. Quin says (p. 10, R.) that his bill for medical services was rendered for $400, but he does not say to whom it was rendered, or by whom it was paid.

We must presume that it was rendered to and settled by Mrs. O'Brien, since the declaration is silent on the subject.

Under this assignment of error, therefore, it only remains to be considered whether the joinder of the husband in a suit by the wife to recover damages sustained by her is an

error so fatal that it can be availed of in a motion in arrest of judgment.

Since the code of 1880, whereby married women in Mississippi are authorized to sue as if unmarried, Mrs. O'Brien could, undoubtedly, have brought and maintained this suit in her own name.

But it by no means follows that the effect of the statute is to prohibit a husband from joining in an action instituted by the wife for a tortious injury.

There would seem to be no insuperable obstacle to such joinder, for the cause of action would still be the injury to the wife, and the recovery would be limited to damages for that injury, exclusive of losses sustained by the husband, and for which he alone could sue.

The effect of the statute in this respect has never been passed upon by the courts of Mississippi.

It is respectfully submitted that the sole purpose of the statute was to enable married women to sue alone, and that it was not designed to prohibit husbands from joining them, if willing to do so, and if they consented to the joinder.

The question has arisen in other States upon similar statutes, and there is some diversity of opinion, but nowhere has it been held that such joinder would be deemed fatal, where objected to for the first time, upon motion in arrest of judgment.

The cases are collected in Stewart on Husband and Wife, p. 439, and, to some extent, in *Michigan Central R. R.* vs. *Coleman*, 20 Mich., 440.

It is certain that such joinder of the husband, if it is deemed a misjoinder, cannot be availed of upon a motion in arrest of judgment, in view of Sec. 1511 of the Code of 1880, which is as follows:

> "The nonjoinder or misjoinder of a plaintiff shall not be objected to by the defendant at the trial, unless

> he give written notice thereof with his plea, stating the name of the person alleged to have been omitted, or improperly joined, and the court or jury, at any time before the trial of the issue, whether in law or in fact, may allow the declaration and writ to be amended by joining the party so omitted, or striking out the party so improperly joined, *provided* the party to be joined or stricken out shall consent thereto, and the court or judge may impose such terms as may be thought proper."

No such notice was given by the defendant before the trial. If it had been, doubtless, the husband would have been stricken out, since the suit could, under the statute, have proceeded without him.

The objection presented by the motion in arrest, was an afterthought, and comes too late.

The purpose of the statute is to prevent the objecting for misjoinder, by motion in arrest of judgment, or otherwise, unless notice shall have been given thereof as required, so that the defect may be remedied by striking out the party improperly joined.

II.

Messrs. Hoadly, Johnson and Coulson discuss the exception to the reading of Dr. Quin's written statement as to Mrs. O'Brien's condition, as though the statement was admitted in evidence as competent in and by itself.

This is not the case. Dr. Quinn testified that he had examined the written statement, and that after examining it, it was his opinion that he had therein correctly stated her condition at the time he had given it.

The case of *Russell* vs. *Hudson R. R. Co.*, 17 N. Y., 134, cited by counsel was very different.

There, the witness stated that the memorandum was

made at the time of its date, and that when he made it, he knew it to be true.

He did not say that he could not at the time he was testifying, remember the facts, nor did he testify further. As the Court said, "for aught that appears, the witness had a distinct recollection of all the facts, independent of the memorandum."

Under such circumstances, the memorandum in that case was clearly, improperly admitted.

In the case at bar, Dr. Quinn simply affirmed under oath, what he had previously reduced to writing.

The objection, suggested by Mr. Nugent, that because this statement had not previously been filed in the cause, the defendant had not the opportunity to cross-examine the witness upon it, is made for the first time in his argument here.

The only objection made to it at the trial was "because it was not made by said Quinn under oath, and in defendant's hearing, or with their knowledge and consent; because it was hearsay evidence at best, and could only be referred to by the witness, in any event, so as to refresh his recollection at best, and was wholly incompetent in this proceeding." (Rec., p. 9.)

He must stand or fall by the objection made then, and cannot present an additional one here.

But leaving the contents of the written statement entirely out of consideration, the remaining testimony of Dr. Quinn is full and complete as to Mrs. O'Brien's injuries, so that it is entirely immaterial whether the statement should have been admitted or not.

And the Court, taking this view of it, properly required the balance of the testimony of Dr. Quin to be put into the bill of exceptions.

This assignment is wholly without merit.

III.

The 3d assignment has been discussed along with the preceding one.

IV.

The Court did not err in permitting the witness Roach, to repeat the conversation with the engineer, wherein the latter stated to him that at the time of the accident, the train was running about eighteen miles an hour.

The defense was a species of confession and avoidance.

It was not pretended at the trial, nor is it here, that the track at the point of the accident was safe and sound, or that the company believed it to be safe and sound.

It is admitted that it would not bear the ordinary schedule speed of the road. The distance between Jackson and Vicksburg is forty-five miles, and the regular schedule time between these points was two and one-half hours.

Making no allowance whatever for stops, the train had to run eighteen miles an hour exactly to make the schedule.

Allowing for stops, of course the speed must have been greater.

It is not shown that the engineer, or conductor, or any officer of the train, had orders to lessen the speed in passing this point, and we must presume that no such orders had been given, since, in view of the defense made, if any such orders had been promulgated, they would certainly have been put in evidence.

The defense, therefore, rests wholly upon the claim that the track could safely bear a train whose speed did not exceed fifteen miles an hour, and that, as a matter of fact (accidently we must presume), the train, when the accident occurred, was not travelling at a greater speed.

The engineer, between ten and thirty minutes after the happening of the disaster, stated to Mr. Roach that the train was running about eighteen miles an hour.

If there is any merit in the defense (which is denied), the issue as to plaintiff's right of recovery was narrowed down to the question of the train's speed, and that became the main fact to be determined.

For the purpose of controlling the speed, unlimited power was conferred upon the engineer.

Except through him the company could not, *ex necessitate rei*, act in this matter.

He was the agent of the company with plenary power.

If he exceeded the rate of speed allowed, the company is responsible.

Or, if he exceeded the speed the track would bear, without the company having informed him of its condition, it is also responsible.

The testimony as to the speed, was therefore pertinent to the issue.

The declarations of the engineer constitute the very fact to be proven, and are not the mere admission of some other collateral fact. The company itself could not know the speed except from him. His statements therefore, are the statements of the company.

Suppose the engineer had told the company that the train was going eighteen miles an hour, and the company had then given this information to the plaintiff.

Upon the trial, if the statements of the company had been offered, could it have excluded or avoided them, by saying that it knew nothing itself except what the engineer had stated, that this was hearsay, and that the only way to prove the speed was to put him on the stand?

Clearly not; and yet there is no difference between such a case, and this, where the engineer made his statement directly to the plaintiff, instead of through the company.

In either case, he is the only person who could know the speed of the train.

It is therefore submitted that his statements are competent evidence to establish the speed, no matter when made, as being in the very nature of the case, the admissions of the company itself.

Aside from this view, they were admissible as part of the *res gestae.*

There has been much discussion by the courts and text writers as to what statements are admissible in this way, and the views expressed by them cannot be reconciled.

This Court has lately reviewed the authorities and taken an advanced position, which is commended by reason and justice.

Insurance Co. vs. *Mosely*, 8 Wall, 397.

Under the rule there laid down, and that in the case of *Hanover R. R. Co.* vs. *Coyle*, 55 Penn. Stat., 492, and that in 2 Bingham, cited by this Court with approval, the testimony of Roach was certainly admissible.

The engineer's statement was made in view of the wrecked cars and the wounded travellers, and immediately after the happening of the fact. It was made with reference to the speed of the train, the regulation of which was the principal duty assigned to him by the company.

It was as to a fact peculiarly within his knowledge.

The statement could not, however, have been deemed essential to the plaintiff's case, since there was ample testimony as to the speed of the train aside from this, and it was merely cumulative.

It does not appear what testimony upon this point the defendant introduced.

Mr. Nugent, in his argument here, says that the *conductor* testified that the train was travelling fifteen miles an hour.

The *record* does not show this, but assuming it to be so, we would naturally infer that the *engineer* was either not upon the stand or did not testify satisfactorily.

The defense made may be justly characterized as no defense at all.

Here was a section of rail which had been in constant service for *forty-two years*.

The iron, if *new*, would have been too light to bear the weight of modern locomotives and trains. The rail which broke had been previously entirely worn out, and had been taken up, patched after a fashion, and relaid.

The attention of the company had been called to the condition of this portion of the track by the superintendent, and they had responded to his call by patching a few of these old, light, worn-out rails.

A passenger train comes along, the rotten strip of iron, masquerading as a rail, is mashed by the weight, the cars smash up, and this lady is crippled for life.

That is the case presented by the record. She demands compensation for the gross wrong done her, and is answered that the company is not liable, because, while the rail was old and worn, and unsafe for ordinary traffic, it was safe when passing trains ran only fifteen miles an hour, and this train, the *conductor* said, was going at that speed.

The plaintiff and her fellow-passengers, who could not estimate the speed of the train, could not deny this; and it mattered not that the engineer had said that the train was going eighteen miles an hour.

The engineer's testimony could not be had, from some cause, as we infer from the record; and if his statements to Roach can be excluded upon a technical rule of evidence, the great iniquity goes unpunished, and the plaintiff is left to reflect upon the injustice of a law, which permits her to be ruined for life by the reckless greed of a corporation, and furnishes no redress.

It is absurd to figure so precisely upon the speed of a train, to determine what the track will bear.

By what reasoning can it be maintained that a track which is unsafe for a train going fifteen and a half, sixteen, seventeen, or eighteen miles an hour, becomes entirely safe for one going fifteen miles?

To ask the question is to characterize the defense here as a sham, trick, and miserable fraud.

It is false and rotten, and did not command the respect of the court or the jury.

The verdict was for the plaintiff, not because the engineer testified that the train was running more than fifteen miles an hour, but because the track was worn out and unsafe, and the company knew it.

That is the whole of this case; and the quirks and quibbles invented by counsel cannot obscure the truth.

V.

The 5th assignment is covered by the discussion of the foregoing.

VI.

The report of Raworth, the Superintendent, was clearly admissible, to show the state of the road at that time, and that its condition was known to the company.

It was not intended by that report alone, to show the condition of the road where and when the accident occurred. The report was supplemented by other testimony showing that the track which gave way was part of the section so emphatically condemned by the superintendent in March, 1880, and that its condition meantime had not improved.

The objection made to its introduction (Rec. p. 14), was that it "was not competent in any event to charge defend-

ant with an injury received at a particular point of the track; and that it was made at a period of time too remote from the date of the disaster."

This objection was fully met by the additional testimony connecting the report directly with the particular part of the track where, and time when, the disaster occurred.

The proposition pressed by counsel, that Raworth should have been introduced to prove the facts stated in his report, was not made in the court below and cannot be considered here. The same is true as to the suggestion, that the report should have been rejected, because it was not shown to have been based upon his personal knowledge.

They may be answered, however, by calling attention to the fact, that Raworth was put upon the stand by the defendant, and that upon being interrogated thereto by plaintiff, he stated (Rec., 19), that the report of March, 1880, "represented fairly certain portions of defendants' road at that time."

VII.

The reports of Rigby and Nesburg, the president and secretary of the company, were properly excluded. They could have shed no light whatever upon the issue in the case, had no connection with Raworth's report, and being the statement of agents, were not admissible in behalf of their principal.

VIII.

The eighth assignment is frivolous, because the record does not show what answer, if any, Raworth gave to the question, as to whether he had made similar representations to the company in 1874.

It cannot be known, therefore, whether the defendant was injured by the question or not.

IX.

The court properly declined to charge the jury as requested by counsel for the defendant.

In the first place, the request refused, assumed, as a fact proven or admitted, that if the train was only moving at the rate of fifteen miles an hour, the defendant was not liable, whereas, the testimony was conflicting upon this point, and it was part of the issue the jury were to try.

It did not leave it to the jury to say, upon all the testimony, whether the speed at which the train was going, was in any sense, an important consideration, but made it their duty to acquit the defendant, if the speed was only fifteen miles an hour.

In the second place, the charge eliminates entirely all consideration of the excessive age of the broken rail, its lightness, the weight of the modern rolling stock, etc., and lays it down as a matter of law, that the company was not liable, so long as external observation detected no weakness.

A rail fifteen years old might, so far as external appearances go, seem to be sound and strong, but no engineer would say it was sound if he knew its age.

Here, the company knew the age of the broken rail, knew that it had previously worn out, and been welded to make it capable of further use, and no matter what its external appearance may have been, the jury were entitled to consider these things in determining whether the rail was sufficient, and whether the company exercised reasonable prudence in continuing to use it.

In the third place, the request, if given, would have excluded from the jury all consideration of the effect which the rotten cross-tie may have had in causing the accident. That may have caused the derailment of the train without reference to the strength of the iron rail, or the speed at which the train was moving.

But counsel are precluded by the record from urging here the exception taken to the refusal of the Court to grant the request.

The record shows (Rec., 21) that this refusal was before the Court had given its own charge, and the exception was then taken.

After this the Court charged the jury, and the request refused was considered by the Court in preparing its charge.

Its charge was "read to the jury in the hearing of counsel for the parties, and, when the same had been read, counsel for defendant announced to the court that he was satisfied with the charge of the Court *as given*, and made no further request or objection in reference thereto."

Here was an express waiver of the exception he had taken to the refusal of his request.

He was satisfied with the charge *as given*. That is, he assented to it as a full and fair statement of the law, and waived his exception.

The record (p. 22) shows that he took an exception, and that is true; but he waived it after having taken it.

Objection is now made to so much of the Court's charge as instructed the jury that Sec. 1050 Miss. Code of 1880, cast upon the company the burden of showing that the accident did not result from negligence.

No exception was taken to the charge when given, and none can be urged here.

The writer has only been recently connected with this case, and the other briefs filed here for defendants in error, though signed by him, were not prepared by him. He simply signed them to accommodate counsel who tried the case below.

This by way of apology for this brief, which might otherwise seem to be the third prepared by the same person.

T. C. CATCHINGS,
of Counsel.